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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

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THE PEOPLE,

Plaintiff and Respondent,

v.

ENRIQUE CUEVAS AYALA,

Defendant and Appellant.

C077032

(Super. Ct. No. P13CRF0451)

Defendant Enrique Cuevas Ayala appeals his convictions for possession of methamphetamine for sale and transportation of methamphetamine. He contends the reconstructed record is inadequate for a meaningful review of the search warrant officers obtained to search his home and car, along with his accomplice's home. In the event we conclude the record is adequate, he requests we review the search warrant to determine whether it is supported by probable cause. Defendant further challenges the sufficiency of the evidence supporting his convictions, the giving of the aiding and abetting instruction, and the admission of several portions of his police interview. Lastly, defendant contends cumulative error resulted from these individual errors.

The People concede instructional error and we agree. Accordingly, we reverse defendant's convictions; however, we find the evidence presented at trial sufficient to sustain the convictions. We also agree with defendant that the record of the search warrant was improperly reconstructed, and we cannot conduct a meaningful review of his sufficiency of the evidence claim in its present state. Thus, while we reverse for instructional error, we do so with direction to the trial court on the necessary steps to undertake in the event the prosecutor elects to refile charges against defendant.

## FACTUAL AND PROCEDURAL BACKGROUND

### I

#### *The Crime*

In the evening hours of August 16, 2013, El Dorado County Sheriff's officers obtained and executed a search warrant<sup>1</sup> at a home in Placerville where Arturo Canales lived that belonged to his grandmother. After officers arrived, defendant was detained outside the residence near a white sedan and Canales was detained near a detached garage, which had been converted into a living space. Jose Espinosa Cuevas fled the scene but was soon detained.

Upon a search of the converted garage where Canales lived, officers found 446 grams of methamphetamine packaged as a single unit in three plastic bags hidden in a toaster oven. Multiple plastic bags had defendant's fingerprints on them, while Canales's fingerprints could not be positively identified. Officers also found a black zipper bag next to the bed containing 1.35 grams of methamphetamine, a scale with white residue on it, and 27 small plastic bags. Officers also seized two cell phones. Canales told officers defendant had brought the large bag of methamphetamine to his home to sell to another

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<sup>1</sup> The search warrant contains both sealed and unsealed portions. We do not refer to any information contained in the sealed portion of the search warrant. At trial, the jury was instructed that officers conducted a lawful search pursuant to a warrant.

man who was there just prior to the officers' arrival but had left. Canales admitted he took the large quantity of methamphetamine from defendant and put it into the toaster oven.<sup>2</sup>

Defendant also spoke with officers. In his interview, he said he came over that night with his nephew to visit with Canales. Defendant denied ever having been inside of Canales's house or knowing drugs were present. Defendant also consented to a search of his car and his house and denied that drugs were in either location.

The search warrant authorizing search of Canales's house also permitted a search of defendant's home and car. Nothing of evidentiary value was found in defendant's car. During a search of defendant's home, officers found two cell phones in a bedroom appearing to belong to defendant. When one of the cell phones was activated, a conversion chart converting pounds to grams and ounces appeared on the screen. In a cabinet was a prescription-type pill bottle with eight plastic bags inside. Officers found this significant because plastic bags are commonly used to sell smaller quantities of drugs.

## II

### *Legal Proceedings*

#### A

##### *The Instruction*

During a discussion on jury instructions, the prosecution indicated it would seek conviction on an aider and abettor theory. Defendant did not object to the prosecution's request for instructions on this theory. The court instructed the jury on aiding and abetting pursuant to CALCRIM No. 400 stating, "A person may be guilty of a crime in two ways. One, he may have directly committed the crime. I will call that person the

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<sup>2</sup> Canales recanted these statements at trial and testified the methamphetamine was his alone and defendant had nothing to do with its presence.

perpetrator; two, he may have aided and abetted a perpetrator who directly committed the crime. [¶] A person is guilty of a crime whether he committed it personally or aided and abetted the perpetrator. [¶] Under specific circumstances if the evidence establishes aiding and abetting of one crime a person may also be found guilty of other crimes that occurred during the commission of the first crime.”

During deliberations, the jury had a question about the intent required for aiding and abetting. It read in whole: “If we believe there was intent to sell and person ‘A’ aided and abette[d] in that inten[t], does that meet the definition of ‘intent to sell.’ ” The court answered, “YES.” The record reflects counsel were contacted via conference call before the court answered the question.

## B

### *The Search Warrant*

Defendant moved to suppress, dismiss, and traverse the search warrant arguing the warrant lacked probable cause. Defendant sought to suppress the items found in his home and Canales’s home, as well as statements to police. As part of his argument, defendant requested a sealed portion of the warrant be unsealed and provided to him. After viewing the sealed portion of the warrant, the court denied defendant’s request. The court also found sufficient probable cause to justify the search. It accordingly denied defendant’s motions to suppress, dismiss, and traverse the warrant.

At trial, the court admitted portions of the search warrant into evidence. These portions included the “SEARCH WARRANT” signed by the magistrate and a description of the homes to be searched and the items to be seized.

When compiling the record for appeal, it was discovered the search warrant and affidavits, including sealed affidavits, kept on file with the superior court had been lost. During a hearing on the matter, at which defendant’s appellate counsel was present, the prosecutor advised the court that he had talked to the officer in charge of obtaining the search warrant, who said he had a copy of the warrant in his records. The court indicated

it knew the officer, and others at the department, kept these types of records. The court ordered the officer to provide his copy so that it may be included in the appellate record with an accompanying statement indicating the officer's usual practice of preserving records such as these.

Appellate counsel pointed out to the court that the ultimate duty to confirm the records submitted matched the court's copy would be by the trial court or the magistrate. The court said it had reviewed the warrant in the past and seeing it again would hopefully "jog [its] memory." Defendant did not object to this procedure. The officer subsequently complied with the court's order and filed his full copy of the search warrant, including the sealed portion, with the superior court before it was transmitted to this court. No further hearing was held on the matter and nothing in the record indicates the trial judge or magistrate reviewed the warrant and affidavits submitted by the officer before transmitting them to this court.

The copy filed with this court includes the same signed "SEARCH WARRANT" and description of the places to be searched and items to be seized. It also includes the officer's description of his experience and training, followed by a statement of probable cause. The document further includes an explanation of how a portion of the warrant was sealed. In a separate envelope is the sealed portion of the warrant application. Along with the search warrant and affidavit, the officer submitted a short statement signed under penalty of perjury declaring that he was the affiant for the search warrant. He further declared that "[f]or my records, I maintained a copy of the search warrant and attachments, affidavit, [sealed] statement and addendum. [¶] The attached documents are true and accurate copies of my records."

## DISCUSSION<sup>3</sup>

### I

#### *There Was Instructional Error*

Defendant contends the trial court erred by improperly instructing the jury on the intent required for aiding and abetting, and that the error was compounded by the court's incorrect answer to the jury's question. The People argue defendant has forfeited this contention by failing to object, but also agree that error occurred. We conclude the court erred in its sua sponte duty to correctly instruct the jury regarding the intent required for accomplice liability; thus an objection was not required. We accept the People's concession and reverse.

A trial court has a sua sponte duty to instruct the jury on the essential elements of an offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) In addition, “[a] court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial.” (*People v. Moon* (2005) 37 Cal.4th 1, 25.) This sua sponte duty to instruct also mandates explanatory instructions when a term in an instruction has a “technical meaning that is peculiar to the law.” (*People v. Howard* (1988) 44 Cal.3d 375, 408.) An appellate court applies the de novo standard of review in determining whether the trial court had a duty to give a particular jury instruction sua sponte. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.) “[A] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.” (*Id.* at p. 570.)

The trial court instructed the jury on accomplice liability by only using the general statement that defendant could be found guilty as an accomplice. It did not inform the

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<sup>3</sup> This matter was assigned to the panel as presently constituted in November 2018.

jury of the elements required for that finding, most important of which is that defendant have the intent to commit the underlying offense. (See *People v. DeJesus* (1995) 38 Cal.App.4th 1, 23 [“To be an accomplice, one must act ‘ “with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging, or facilitating commission of, the offense.” ’ ”].) As worded, the instruction informed the jury defendant was guilty if he directly committed the crime or helped someone else commit the crime. Thus, when reading the instructions together, the jury would be permitted to find defendant guilty if it found Canales had the intent to commit and did commit possession of methamphetamine for sale and defendant assisted him in doing so. The instructions do not inform the jury that in such situation, it must also find defendant knew or intended Canales possess the methamphetamine for sale.

This confusion was compounded by the court’s answer to the jury’s question, confirming its belief that if defendant assisted someone who intended to sell methamphetamine he possessed the required intent. This is an inaccurate statement of the law, which we cannot say is harmless given the jury’s question. Accordingly, we must reverse.

The parties both request we reverse defendant’s conviction for possession of methamphetamine for sale, but we conclude it appropriate to reverse his conviction for transportation of methamphetamine as well. Prior to defendant’s trial, Health and Safety Code section 11379 defining transportation of methamphetamine was amended to define transportation to mean transportation for sale. (Stats. 2013, ch. 504.) This codified the Legislature’s intent to target drug traffickers and those involved in drug sales. (Assem. Bill No. 721, 3rd reading Apr. 19, 2013 (2013-2014 Reg. Sess.) p. 2.) Thus, the prejudice resulting from the instructional error equally affected the

transportation/furnishing conviction because the intent to sell is a central component of that offense as well. Reversal is required for both of defendant's convictions.<sup>4</sup>

Seeking to prevent a retrial, defendant challenges the sufficiency of the evidence supporting his convictions arguing the evidence failed to show he had control over the methamphetamine and that he harbored the intent to sell the methamphetamine.<sup>5</sup> Specifically, he argues his presence at Canales's house and his fingerprints on the bag containing the methamphetamine were insufficient to show he had control over the drugs, while he attacks as nonexistent the evidence showing he intended to sell the methamphetamine. We disagree.

More evidence than defendant's mere presence and fingerprints was admitted at trial to show he had control over the methamphetamine and knew or intended for the methamphetamine to be sold. Most importantly, Canales told officers defendant had brought him the methamphetamine (i.e., controlled) so that Canales could sell it to a man who was on the property with both Canales and defendant just prior to the officer's arrival (i.e., intended to sell). Although Canales recanted his statements during testimony, the jury was permitted to accept Canales's prior inconsistent statements as true. (Evid. Code, § 1235.) These statements were corroborated, thus providing sufficient evidence to support defendant's convictions, by defendant's presence on Canales's property at the time the drug deal occurred and by defendant's fingerprints on the bags containing the methamphetamine. (See *People v. Falconer* (1988) 201

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<sup>4</sup> Because we reverse on defendant's instructional error claim, we need not consider his evidentiary or cumulative error claims.

<sup>5</sup> In his briefing, defendant contends only the evidence showing he possessed methamphetamine with the intent to sell was lacking. We construe this claim to challenge both his convictions and not just the possession conviction because, as described, the intent to sell is a central component of both convictions as is the defendant's control over the methamphetamine.



Cal.App.3d 1540, 1543 [to be sufficient to sustain a conviction, an accomplice's testimony must be corroborated by independent evidence].) This evidence is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

## II

### *The Record Was Improperly Reconstructed*

We cannot reach defendant's search warrant claims because the reconstructed record as it presently stands prevents meaningful review. The proper procedure to undertake when a search warrant or sealed affidavit is missing from the record is to "remand the case to the superior court with directions to hold a hearing to reconstruct or settle the record as to the missing search warrant affidavit and augment the record accordingly." (*People v. Galland* (2008) 45 Cal.4th 354, 373.) Reversal is required only when " " "critical evidence or a substantial part of a [record] is irretrievably lost or destroyed, and there is no alternative way to provide an adequate record so that the appellate court may pass upon the question sought to be raised." ' ' ' (Id. at p. 370.)

"We review the superior court's findings regarding the reconstruction of the original search warrant affidavit, which are essentially factual, under a deferential substantial evidence standard. We then independently determine whether the record, as reconstructed and settled by the trial court, is adequate to allow the appeal to proceed meaningfully." (*People v. Galland, supra*, 45 Cal.4th at p. 370.)

There is no indication the trial court ever looked at the documents submitted by the officer in charge of obtaining the search warrant and there is no finding for us to review for substantial evidence or otherwise. Reversal is unwarranted on this basis, however, because there is no indication the record has been irretrievably lost or destroyed. (See *People v. Galland, supra*, 45 Cal.4th at p. 370.) Because we have reversed defendant's convictions already, this is a problem only in the event the prosecution elects to retry defendant's case. If the prosecutor elects to do so, the trial

court must review the reconstructed record and make findings as to whether the submitted materials adequately represent what was originally viewed by the magistrate when granting the warrant or the trial court when ruling on defendant's motion to suppress. This would ensure meaningful review of defendant's case following a retrial.<sup>6</sup>

#### DISPOSITION

The judgment is reversed. In the event the prosecutor elects to refile charges against defendant, the trial court is directed to conduct further proceedings consistent with this opinion.

/s/  
Robie, J.

We concur:

/s/  
Raye, P. J.

/s/  
Duarte, J.

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<sup>6</sup> Although not argued by the People, we question whether defendant has standing to challenge the search of Canales's home and the seizure of items found therein. (See *People v. Hernandez* (1988) 199 Cal.App.3d 1182, 1189 ["those who have a legitimate expectation of privacy in the invaded place or seized thing" have standing to challenge a search or seizure].) Also, upon an adequate record that demonstrates the circumstances of defendant's detention, we question whether defendant consented to a search of his own home and car. (*Florida v. Royer* (1983) 460 U.S. 491, 497-498 [75 L.Ed.2d 229, 235-237] [defendant's manifestation of consent must be a product of his free will, rather than a mere submission to an express or implied assertion of authority].)